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Source: *Publications of the American Jewish Historical Society*, 1911, No. 20 (1911), pp. 137-146

Published by: The Johns Hopkins University Press

Stable URL: https://www.jstor.org/stable/43057881

RHODE ISLAND AND CONSANGUINEOUS JEWISH MARRIAGES.

By Benjamin H. Hartogensis, A. B.

Statutes of law making exceptions for Jews have, in the past, not been unusual in the several colonies and the United States; they either conferred rights of denization during residence, or of naturalization, or set aside the usual requirement in taking the oath of office, to do so on the faith of a Christian, or see to it that religious scruples as to Sabbath observance may not prejudice the economic condition of Jews, or that marriages as solemnized according to Jewish forms and ceremonies, shall be as binding as if actually celebrated *in facie ecclesiae,* in the face of the church. A further exception in no wise affects the rights of citizenship, or of office-holding, nor puts Jews under disabilities or restrictions, nor hampers them in the pursuit of their trades and business. The restriction, to which I shall now refer, is on marriage within certain degrees of consanguinity or affinity by marriage, and I shall give the history of the Rhode Island legislation in this regard.

Physiologists have proved that marriage between next of kin produces weak and degenerate offspring; furthermore it is abhorrent to the ideas of civilized people. The difficulty is to find the point in the nearness of relationship, which constitutes a disqualification to marriage, and where it should be drawn. Here the Mosaic law as laid down in Leviticus xviii, 6, finds full approbation in modern science and has been established in our social scheme; so that most codes of law have adopted in some form this table of Levitical degrees as a whole, generally giving due credit therefor; and some have gone further, prohibiting not only marriages like those expressly forbidden, *e. g.,* not only to a granddaughter as mentioned therein, but also to a daughter, not

expressly forbidden; and further to a deceased wife's sister, and of cousins, these last not included in the Mosaic table.

Although the Mosaic law forbids the marriage of nephew and aunt, as appears in Leviticus xviii, 12-14; xx, 19-20, the Talmud not only permitted, but even recommended [1] the marriage between uncle and niece. There is but one Biblical instance; Othniel, brother of Caleb, married his niece Achsah (Joshua xv, 17).

And as a result such marriages are occasionally celebrated even here in America, despite the fact that they are all but universally prohibited with severe penalties. There seems to be a general impression among well informed people that these avuncular marriages were, in the past, generally allowed by American law, whereas just the contrary was true. Moreover there was a reason for this misunderstanding. Thus a decision by the City Court of New York, May, 1885,[2] held that an uncle may lawfully marry his niece; and the reporter states in a footnote that in some of the states such marriages are void. The prohibition was put in the law of New York in 1893;[3] in Maryland, in 1860, such marriages previously had were confirmed, and a similar act of confirmation was passed in Louisiana in 1904, while in Florida the prohibition was not codified until 1892. It was not expressly prohibited in South Carolina before the code of 1871, and such a marriage was expressly confirmed there by a decision in 1858.[4]

[1] Mielziner, "Jewish Law of Marriage and Divorce," p. 39.

[2] Matter of Williams, 2 City Court Reports, 143; see Albert M. Friedenberg in *Publications of the American Jewish Historical Society*, No. 12, p. 96.

[3] Laws of New York, 1893, c. 601. This act makes such a marriage incestuous and void. Weisberg *v.* Weisberg, 112 App. Div. (N. Y.) 231, held that such a marriage to one's niece, before this act of 1893, would not be annulled, as the act has no retroactive effect. See Friedenberg in *Publications*, No. 19, p. 169 *et seq.*

[4] Bowers *v.* Bowers, 10 Richardson's Equity (South Carolina), 551.

Laxity in enforcement of the law may have arisen because marriages within the prohibited degrees were voidable by the common law of England and only made void *ab initio* by an act of Parliament passed too late[5] to become part of the American common law. Moreover in many states, *e. g.*, Maryland, while the statute makes such marriages void, the courts have said that they are merely voidable,[6] and the marriage to one's niece, not being a heinous offense, it has never been thought worth the while of the public prosecutor to enforce the penalty. So the people have thought there was none. Marriages in direct lineal line of consanguinity are not unlawful by the law of the land, and in the absence of express prohibitions in the statute, a marriage is not void for consanguinity, there being no canonical disabilities in the United States.[7]

But everywhere now the law expressly forbids such marriages. A matter for surprise is that Rhode Island has allowed special privileges to its Quakers and Jews. This began with the act of Assembly, passed June, 1764, and makes the unique exception as to all kinds of intermarriage otherwise prohibited, in favor of such as are in accordance with Jewish belief and practices. This has been continued in the codes of Rhode Island from 1798 down to the present one, enacted in 1909. In the section following that setting forth the marriages prohibited as being within the Levitical degrees and especially including marriage to a brother's daughter and a sister's daughter, occur these words:[8]

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[5] Bishop, "Marriage, Divorce and Separation," vol. i, sec. 288.

[6] Harrison *v.* State, 22 Maryland, 468; Dennison's case, 35 *ibid.*, 361.

[7] 26 Cyclopedia of Law and Procedure, 845. At common law canonical impediments of consanguinity and affinity rendered a marriage voidable merely; the same is true where such marriages subject to such impediments are merely prohibited by statute, *ibid.*, p. 846.

[8] Code of Rhode Island, 1909, c. 243, sec. 4.

The provision in the preceding section shall not extend to or in any way affect any marriage which shall be solemnized among the Jews within the degrees of affinity or consanguinity allowed by their religion.

Further exceptions in favor of the Jews in this code, paralleled in codes of other states, concern themselves entirely with the marriage ceremony, and probably took their origin in the fact that, in England, the mutual consent of the parties had to be interchanged in the presence of a Church-of-England minister or a clerk in holy orders;[9] therefore these words are found in many statutes:

Marriage may be had and solemnized according to the rites and ceremonies of Jews.[10]

No marriage solemnized among the Jews is to be adjudged void if otherwise lawful when believed by either contracting party to be valid.[11]

One naturally expects to find the reason for this special consideration for Jewish religious practice and belief in the very beginning of the history of Rhode Island,[12] and it may be easily traced back to the fondness for the Jews of the just, liberal and tolerant Roger Williams,[13] that broad-minded

[9] Bishop, *supra*, sec. 391.

[10] Code of Rhode Island, *supra*, sec. 9. [11] *Ibid.*, sec. 22.

[12] Dr. Cyrus Adler first called attention to the desirability of writing down this history in *The Menorah*, vol. vii, p. 193. Dr. Herbert Friedenwald read a paper on "Influence of the Old Testament on Legislation in the Colony of New Haven" at the meeting of the American Jewish Historical Society, at Baltimore, 1896; see Max J. Kohler, in *Publications*, No. 6, p. 61; Wilner, *ibid.*, No. 8, p. 119.

[13] Oscar S. Straus, "Roger Williams," pp. 173-178; "The Jewish Encylopedia," vol. v, p. 169. Considering this outspoken fondness for Jews, I have copied the following excerpts from Austin's "Roger Williams' Calendar" (1897), many of them quite illustrative:

"His infinite wisdom hath given me to see the city, court, and country . . . . to converse with Jews . . . . and by books to know the affairs and religions of all countries.

Englishman, who played a great rôle in securing the re-admission of the Jews to England.

Not that New England generally, certainly not the Puritans, can be considered as not being steeped to the marrow in Hebraism; thus,

the growth of a sentiment in favor of lay marriages was fostered by the example of the Jewish law

says Professor Howard, and he adds,

Even the conception of a marriage as a civil contract gained support from the Jewish law. Our ancestors loved to cite the

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"By the merciful assistance of the Most High, I have desired to labor in Europe, in America, with English, with Barbarians; yea, and also I have longed after some trading with the Jews themselves, for whose hard measure I fear the nations and England have yet a score to pay.

"Myself have seen the Old Testament of the Jews, most curious writing, whose price (in way of trade) was three score pound, which my brother a Turkey-merchant had and showed me.

"It was a large effusion of the Holy Spirit of God upon so many precious leaders and followers, who ventured their all to New England upon many heavenly grounds, three especially.

"1st The enjoyment of God according to their consciences.

"2ndly Of holding out light to Americans.

"3rdly The Advancing of the English name and plantations.

"All these consciences, yea, the very consciences of the Papists, Jews, etc., ought freely and impartially to be permitted their several worships, their ministers of the worship and what way of maintaining them, they freely choose.

"I commend that man whether Jew or Turk or Papist, or whoever that steers no otherwise than his conscience dares till his conscience tells him that God gives him a greater latitude.

"Is there not more danger (in all matters of trust in the world) from a hypocrite, a dissembler, a turncoat in his religion (from fear or favor of men) than from a resolved Jew, Turk or Papist, who holds firm to his principles?

"There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth or a human combination or society. It hath fallen out sometimes that both Papists, Protestants, Jews and

Book of Ruth and other scriptual texts in its favor and their view of the proper relations of husband and wife, those of parent and child, those of man and wife before marriage was derived directly from Biblical ordinance.[14]

An attempt was made in Massachusetts to formulate the law according to the Mosaic code.[15]

By an act of the Rhode Island Assembly in 1646, marriage was held to be a civil contract throughout New England and statutes were enacted requiring the publication of banns at two town meetings.[16] In 1655 marriages were ordered to be

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Turks may be embarked in one ship; upon which supposal I affirm that all liberty of conscience that ever I pleaded for, turns upon these two hinges: that none of the Papists, Protestants, Jews or Turks be forced to come to the ship's prayers or worship nor compelled from their own particular prayers or worship, if they practise any.

"True civility and Christianity may both flourish in a state or kingdom notwithstanding the permission of divers and contrary consciences, either of Jews or Gentiles.

"Search all Scriptures, Histories, Records, Monuments; consult with all experiences. Did ever Pharaoh, Saul, Ahab, Jezebel, Scribes and Pharisees, the Jews, Herod, the bloody Neroes, Gardiners, Pope, or Devil himself, profess to persecute the Son of God, Jesus as Jesus, Christ as Christ, without a mark or covering?

"It pleased the Lord to call me for some time and with some persons to practise the Hebrew and the Greek, Latin, French and Dutch.

"Being comfortably persuaded that the Father of Spirits, who was graciously pleased to persuade Japhet (the Gentiles) to dwell in the tents of Shem (the Jews) will in His holy season (I hope approaching) persuade these Gentiles of America to partake of the mercies of Europe.

"I have known them to leave their house and to lodge a friend or stranger, when Jews and Christians oft have sent Christ Jesus to the manger."

[14] Howard, "History of Matrimonial Institutions," Chicago, 1904, vol. ii, pp. 130, 131, 152.

[15] Straus, *supra*, p. 84.

[16] Howard, *supra*, p. 152.

published at town meetings, or on training days at the head of the company, or by writing posted in some public place, signed by a magistrate.[17]

Thus we see the influence of Hebraism on the marriage contract developing. By the act of the Rhode Island General Assembly of 1684[18] the Jews received assurances that they might expect as good protection in Rhode Island as any other resident foreigners obedient to the laws. The peculiar language affecting *office* holders,—the oath of office, "on the faith of a Christian,"—seems to belie this generous act, but Mr. Arnold explains it that

> **This act of 1684 is worthy of note as evidence that the famous phrases professing Christianity, etc., were not embodied in the laws of 1663 . . . . but were interpolated at a later date . . . . and as would appear by this act, certainly subsequent to 1684.[19]**

In 1698 an act was passed validating marriages solemnized according to the laws of the colony. In 1701 the marriage laws of Rhode Island were revised. In 1733, according to Arnold (vol. i, p. 113), except the clergy of England, Quakers were the only religious society whose preachers were, as yet, authorized to perform the marriage ceremony, a privilege accorded by the king. The Assembly now empowered the ministers of all denominations to unite persons in marriage.

We are now coming to the period when the influence of the Jews was beginning to make itself felt at Newport, the domicile of most of the Jews in the colony;[20] when by reason of their importance to the colony, their contributions to its wealth, to its material and cultural growth, special provision was made for the Jews and attention given to avuncular marriage.

In 1740, the Navigation Act[21] exempting Jews from receiv-

[17] Arnold's "History of Rhole Island," vol. i, p. 260.
[18] *Ibid.*, p. 478. [19] *Ibid.*, p. 479.
[20] Kohler, in *Publications, supra.*
[21] Hollander, in *Publications*, No. 5.

ing the sacrament as a qualification for office was passed. In March, 1762, the Superior Court rejected the petition of certain Jews to be naturalized

as wholly inconsistent with the first principles upon which the colony was founded, and the laws of the same as now in force.[22]

This has been explained by Max J. Kohler as playing at a game of politics, and it seems as if it was entirely at variance with the consistent history of that liberal treatment of Jews in according them full rights, which is now being traced; for, in the decade just preceding this, many Jewish families of wealth and distinction had come thither from Spain and Portugal, many coming because of the earthquake at Lisbon (1755). In 1764 the legislature recognized the validity of Jewish marriages, exception being specially made in favor of

any persons possessing [professing] the Jewish religion who may be joined in marriage, according to their own usages and rites.

One must consider the influence of the Old Testament on the colonists just about to shake off allegiance to the mother country,[23] and the same influence in the development of the Declaration of Independence,[24] the address of the Newport Congregation to President George Washington and his cordial reply thereto, the effect of which could not have been other than to arouse strongly the feeling of the people of Rhode Island for the Jews; and perhaps the association of Jews with lawmakers in the Masonic lodges[25] at this time was not without its influence in sharply defining this predilection. In 1794 by an act to prevent clandestine marriages it was enacted that regular ordained ministers of all religious de-

[22] Arnold, *supra*, vol. ii, p. 495, and Kohler, *supra*.

[23] Oscar S. Straus, "'Origin of the Republican Form of Government in the United States."

[24] Herbert Friedenwald, "Declaration of Independence," pp. 184, 185.

[25] Oppenheim, in *Publications*, No. 19, pp. 18, 19, 20.

nominations shall have the fullest authority to join persons in matrimony.

We now come to the special exemption from the laws touching marriage within the prohibited degrees of affinity and consanguinity, allowed by the Jewish religion. I have had the acts of the Assembly of the State of Rhode Island carefully examined, but fail to find this statute before its appearance in the Code of 1798.[26]

Such marriages are not to be compared with those wrongfully or unintentionally celebrated without a license or banns; or by a minister defectively ordained or without subsequent notice to the registrar. When such take place, they are valid.[27] Nor do they fall within the category of marriages prohibited by Jewish law, but allowed by our statutory law,

[26] My thanks for examining acts of various Rhode Island Legislatures, in order to find this Act of Assembly, are due to Mr. F. G. Bates, Librarian of the Rhode Island Historical Society, at Providence, and to Mr. Arthur A. Dembitz, of Philadelphia, who examined the same acts in the Charlemagne Tower Collection of the Pennsylvania Historical Society.

[27] A marriage is said to be void when it is good for no legal purpose; and its invalidity may be maintained in any proceeding in any court between any parties, whether in the lifetime or after death of the supposed husband, whether the question arises directly or collaterally. A marriage is said to be voidable when the imperfection can be inquired into, only during the lifetime of both husband and wife. Until it is set aside it is practically valid; when set aside it is rendered void from the beginning. Bishop, "Marriage, Divorce and Separation," vol. i, p. 119. It is likely to be considered so in New York. *Cp.* the opinion in Van Voorhis *v.* Brintnall, 86 New York, 18, 26, to the effect that such avuncular marriages would not be considered in that state as legal under the rule of comity, though made so in the state where consummated. The penalties otherwise, moreover, are fines to the parties as well as to the minister. Nor can one escape the letter and violate the spirit of the law, by proceeding to another country or state, where such marriages are legal. This is also prohibited by statute and regular decisions.

although the contrary seems to be true in England.[28] Such marriages may even have to be construed in the courts of Rhode Island, since because of a like state of affairs they have had to be considered by the British courts.

A marriage, valid where celebrated, will be none the less incestuous here if within the prohibited degrees. Comity will not permit a violation of our criminal law, based on morals and public policy.[29] The decisions against these marriages proceed on the theory that they are against pronounced state policy. But it is not so, in the same sense as miscegenous marriages are forbidden. A Federal decision (1901) by a Pennsylvania judge, not reversed, makes parties to such a marriage liable to deportation.[30]

[28] Surely not unless the ceremony is performed by the civil authorities and perhaps not at all. See H. S. Q. Henriques, "Jewish Marriages and the English Law." Thus a marriage to the sister of a divorced person during the latter's lifetime; or of a *Cohan* to a divorced person. Further examples of such consanguineous marriages are, in addition to those of first cousins, forbidden in Arizona, Arkansas, Illinois, Indiana, Kansas, Louisiana, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Utah, Washington, and Wyoming. Marriages with a brother's son's wife, a sister's son's wife, the wife's brother's daughter, or wife's sister's daughter are likewise forbidden.

[29] State *v.* Brown, 47 Ohio State, 102-109.

[30] "Among the Jews in Russia, where the marriage ceremony took place it has been satisfactorily proved that the marriage . . . . is lawful, and being valid there, the general rule undoubtedly is, that such a marriage would be regarded everywhere as valid; but with this exception, at least, to the rule: If the relation thus entered into elsewhere, although lawful in the foreign country, is stigmatized as incestuous by the law of Pennsylvania, no rule of comity requires a court, sitting in this state, to recognize the foreign marriage as valid (same as to polygamous marriages), because a continuance of the relation would expose the parties to indictment in the criminal court." *In re* Rodgers, 109 Federal, 886, head-note. See also *The Jewish Chronicle*, December 16, 1910; Friedenberg, in *Publications*, No. 12, pp. 87, 96.